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In the
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1963

NO. 23

B. A. REYNOLDS, ETC., ET AL.,
Appellants,
versus
M. O. SIMS, ET AL.,
Appellees.

NO. 27

DAVID J. VANN AND ROBERT S. VANCE,
Appellants,
versus
BETTYE FRINK, SECRETARY OF STATE OF THE STATE OF ALABAMA, ET AL.,
Appellees.

NO. 41

JOHN W. McCONNELL, JR., ET AL.,
Appellants,
versus
BETTYE FRINK, SECRETARY OF STATE OF THE STATE OF ALABAMA, ET AL.,
Appellees.

Appeals from the United States District Court for the Middle District of Alabama, Northern Division.

BRIEF FOR APPELLEE RICHMOND M. FLOWERS AS ATTORNEY GENERAL, STATE OF ALABAMA

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OPINION BELOW

The opinion of the District Court for the Middle District of Alabama is reported as *Sims v. Frink*, 208 F. Supp. 431.

SUBSTITUTION

MacDonald Gallion as Attorney General of the State of Alabama and Bettye Frink as Secretary of State of the State of Alabama are no longer in office as such. They have been succeeded by Agnes Baggett as Secretary of State and Richmond M. Flowers as Attorney General.

The clerk of this Court has recently advised that the two above last-named officials have been, or will be, substituted, and this appellee, Richmond M. Flowers as Attorney General of the State of Alabama is now, or will be, a party to the pending appeals.

BAKER V. CARR

This short brief is filed upon the assumption that *Baker v. Carr*, 369 U.S. 186, will not be overruled in the consideration of these appeals. If such should happen, then another day in court is respectfully requested.

QUESTION PRESENTED

Can the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States be met by apportioning the House and Senate of the State of Alabama according to population *to some extent* in both Houses?

ARGUMENT

It is to be pointed out that the Legislature as provisionally reapportioned by the District Court is effective only until the Legislature of the State of Alabama as provisionally reapportioned "has an opportunity to provide for a true reapportionment of both Houses of the Alabama Legislature." *Sims v. Frink*, supra.

The elections ordered by the District Court have been held; the Legislature as reapportioned by the court decree has met; it has adjourned its Regular Session sine die, without taking any action or availing itself of the opportunity given to it by the court.

It appears therefore that the question of permanent reapportionment as distinguished from one made in an attempt to break the strangle hold is back with the District Court

for future action in the light of *Baker v. Carr*, and possibly the decision of this Court on the pending appeals.

If the District Court has the right to reapportion the Legislature, no good reason appears why the District Court could not do so by applying the following quoted part from its opinion in this case, namely:

> "The result may well be that representation according to population *to some extent* must be required in *both* Houses if invidious discrimination in the legislative systems as a whole is to be avoided."

The Court under the above rule could by proof ascertain every fact necessary for a fair and rational reapportionment which would meet both the State and Federal Constitutions.

The Equal Protection Clause does not demand of state enactments either mathematical identity or rigid equality. *McGowan v. Maryland*, 366 U.S. 420.

In *MacDougall v. Green*, 335 U.S. 281, it was ruled that the Equal Protection Clause does not "deny a State the power to assure a proper diffusion of political initiative as between its thinly populated counties and those having concentrated masses, in view of the fact that the latter have practical opportunities for exerting their political weight at the polls not available to the former."

The prohibition of the Equal Protection Clause goes no further than the invidious discrimination. *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483.

The District Court, after a careful consideration of the State constitutional provisions and the Equal Protection Clause, at least intimated that a rational plan of appor

tionment could be devised by basing both Houses of the Legislature to some extent on population. This plan if its execution is rational avoids any conflict between the State and Federal Constitutions.

The above stated guide lines should be approved by this Court. The test of whether the reapportionment when made either by the Court or the Legislature is rational must await that event before final approval or disapproval by this Court.

CONCLUSION

So, since the measures taken by the District Court, challenged on this appeal, and the elections held pursuant thereto were temporary in character; since the Legislature did not avail itself of the opportunity to make a valid permanent reapportionment; since permanent reapportionment of the Alabama Legislature must be obtained either by the District Court or the Legislature, no good reason appears for the decision of constitutional questions arising from temporary measures which have expired. It is better to await final action of the District Court or the Legislature, as the case may be.

There have been several guide lines suggested in the various briefs filed, but the one which will comply with the Federal Constitution and also avoid striking down State constitutional provisions is the one suggested by the District Court; namely, that representation according to population *to some extent* must be required in *both* Houses to avoid invidious discrimination.

We respectfully contend that the above rule may be applied either by the District Court if it has such power or the Legislature if given another chance.

One thing is certain. The Legislature under State consti-

tutional provisions cannot be apportioned on a strictly population basis. If such is required under the Equal Protection Clause, State constitutional provisions will fall. Courts seek to avoid such result if legally possible. This the District Court did, and its decision is reasonable, rational, and fair as to the guide lines stated.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Gordon Madison, one of the attorneys for the Appellee, Richmond M. Flowers as Attorney General of the State of Alabama, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 7th day of October, 1963, I served copies of the foregoing brief on the several Appellants, Cross-Appellants, and Appellees, by mailing copies in duly addressed envelopes, with first-class postage prepaid, to their respective attorneys of record as follows:

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